

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

William J. Keese, Chairman, Presiding Member

Gary Fay, Hearing Officer

STAFF PRESENT

Jeff Ogata, Staff Counsel

Priscilla Ross, Public Adviser's Office

Paul Richins

Matthew Layton

Dick Anderson

APPLICANT

Christopher T. Ellison  
Ellison, Schneider & Harris, LLP

Mark Seedall, Duke Energy North America

Wayne J. Hoffman, Duke Energy North America

Gary Rubenstein, Sierra Research

ALSO PRESENT

Deborah Johnston  
Department of Fish and Game

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

## I N D E X

	Page
Proceedings	1
Opening Comments	1
Comments on PMPD	
Soil and Water 5	
Christopher Ellison	1
Air Quality	
Jeff Ogata	7
Gary Rubenstein	8
Matthew Layton	9
Christopher Ellison	11
TRANS-9	
Jeff Ogata	14
Christopher Ellison	16
Deborah Johnston, Fish and Game	17
Christopher Ellison	27
Dick Anderson	32
Priscilla Ross, Public Adviser's Office	36
Changes to Project Description	38
Christopher Ellison	38
Jeff Ogata	40
Adjournment	43
Certificate of Reporter	44

1 P R O C E E D I N G S

2 HEARING OFFICER FAY: Call the hearing  
3 to order.

4 Good morning. This is a Committee  
5 Conference regarding the errata on the Presiding  
6 Member's Proposed Decision, issued by the Moss  
7 Landing Power Plant Project Committee. And we  
8 just want to take comments on the errata.

9 As I hope everybody is aware, the full  
10 Commission will consider the Final Decision on the  
11 power plant application this Wednesday, at the  
12 Business Meeting. I'm informed that it's Item 10  
13 on the agenda, but you'll want to check your  
14 agenda to be sure. I'm also told that the first  
15 ten items are likely to move fairly quickly, so it  
16 may come up perhaps an hour, hour and a half into  
17 the Business Meeting.

18 Are there any preliminary remarks before  
19 we begin reviewing the comments?

20 Okay, I see no indication.

21 Mr. Ellison, why don't we start with the  
22 Applicant, and see what comments you have.

23 MR. ELLISON: Thank you, Mr. Fay. Chris  
24 Ellison, Ellison, Schneider and Harris, on behalf  
25 of the Applicant. To my right is Mark Seedall,

1       representing Duke here this morning.

2               Duke supports the errata. We have been  
3       in discussions with the Staff regarding a couple  
4       of minor changes to it, only one of which I will  
5       discuss, and I'll let the Staff describe the  
6       others, and may have some comments after Staff.

7               The one remaining concern that the  
8       Applicant has concerns Condition Soil and Water  
9       Number 5. This is a condition which ensure that  
10      earth disturbing activities will not occur in  
11      areas that are contaminated by PG&E's prior  
12      operations until those areas have been  
13      successfully remediated by PG&E.

14              As written, the condition would prevent  
15      earth disturbing activities, however, in other  
16      areas, uncontaminated areas. And so the  
17      suggestion that we have made and discussed with  
18      the Staff, and believe we have agreement with the  
19      Staff upon, is to change the condition such that  
20      it is focused on the contaminated areas and would  
21      not prevent activities in uncontaminated areas.

22              So the specific suggestion which the  
23      Staff has handed out is based upon wording that we  
24      have suggested, which I'm going to make a slight  
25      change to in a minute. But essentially what it

1       says is that if a site has not been successfully  
2       remediated by PG&E, no earth disturbing activities  
3       within the contaminated areas identified below  
4       shall begin until the appropriate plan is  
5       approved, as opposed to no earth disturbing  
6       activities at all.

7               The one change that I would like to  
8       propose to the Staff's proposed language, if you  
9       have the Staff's language in front of you --

10              HEARING OFFICER FAY:   And you're  
11       referring to page -- well, it's called page 1, but  
12       it's contained in the Staff comments on the  
13       Committee's PMPD errata, Soil and Water 5.

14              MR. ELLISON:   That's right.   I'm  
15       referring to a document handed out this morning  
16       entitled Staff's Comments on Committee PMPD  
17       Errata.   And attached to it, as page -- there are  
18       two page 1's in the document, but the -- this is  
19       the second page 1, coming after page 2, which  
20       contains the specific language proposed for Soil  
21       and Water 5.

22              And if you look at the addition shown  
23       for the second sentence, which in the document is,  
24       quote, "If the site has not been successfully  
25       remediated by PG&E, no earth disturbing activities

1       within the one of the two contaminated areas  
2       identified below shall begin until the appropriate  
3       plan is", and then after some strikeout,  
4       continues, "reviewed and approved by the  
5       California Energy Commission CPM."

6               The one minor editorial changes for  
7       clarity that I would propose is, instead of saying  
8       within the one of the two contaminated areas, to  
9       say instead, within either or both of the  
10      contaminated areas.

11             HEARING OFFICER FAY:  Is Staff all right  
12      with that?

13             MR. OGATA:  Yes.  Jeff Ogata, Staff  
14      Counsel.  Yes, we believe that would be fine.

15             HEARING OFFICER FAY:  Okay.

16             MR. ELLISON:  I don't think that changes  
17      the meaning, it just clarifies.  And with that --  
18      with that change, we would urge the adoption of  
19      the Staff's proposed change to Soil and Water  
20      Number 5, and that is our only proposed change to  
21      the Committee's errata.

22             HEARING OFFICER FAY:  Okay.  And before  
23      we leave the -- before we leave the Applicant and  
24      hear from other parties, I would just like to  
25      confirm for the record that Applicant is in

1 communication with the Moss Landing Harbor  
2 District.

3 MR. SEEDALL: Yes, that's correct. We  
4 are. We're meeting with them tomorrow morning at  
5 8:00 o'clock.

6 HEARING OFFICER FAY: Okay. And will  
7 you have something for the record as a result of  
8 that by Wednesday?

9 MR. ELLISON: Well, of course, it  
10 depends on what occurs at the meeting. But let me  
11 say a couple of things for the record.

12 One is that the -- that Duke will be  
13 continuing the boat washing program, which is one  
14 of the concerns, I think, that has been expressed.  
15 And I think the Committee has accurately reflected  
16 that Duke will continue the boat washing program.  
17 We're going to meet tomorrow to discuss the other  
18 concerns that the Harbor District has raised, and  
19 if any changes that would affect the decision  
20 emerge from that meeting, we will let the  
21 Committee know right away by -- by some sort of e-  
22 mail or telephone call tomorrow afternoon.

23 But that, of course, requires agreement  
24 by not just Duke, but also the Harbor District,  
25 and I -- I can't commit anything on their behalf,

1       so.

2                   HEARING OFFICER FAY:   Sure.   Well, you  
3       know, they've alleged some -- some concerns in  
4       their letter and communications with the  
5       Commission, and if any of those are resolved we'd  
6       just like the record to -- to reflect the  
7       resolution.   Okay.

8                   MR. ELLISON:   Well, just to be clear,  
9       Duke believes that the Harbor District's concerns  
10      are -- are not well founded, but nonetheless  
11      wants to meet with -- with them to discuss those  
12      concerns in order to see if -- if there is any  
13      information that the Harbor District has that we  
14      don't know of, first of all.   But secondly, also  
15      to communicate, you know, the reasons that we  
16      believe that the concerns are not well founded,  
17      and also to discuss if there's any -- any  
18      reasonable measures that -- that the parties can  
19      agree upon that would help address those concerns.  
20      We're certainly open to talking with the Harbor  
21      District about that.

22                   So, you know, the outcome of the meeting  
23      is -- is, you know, not something that I can make  
24      commitments about.   But if there is an outcome  
25      that would change in any way the proposed

1 decision, we will be sure to let the Committee  
2 know immediately.

3 HEARING OFFICER FAY: We have extra  
4 copies of the errata if anybody needs them. And  
5 Sandy's going to put them there. You can grab a  
6 copy now, if you need that. There may be  
7 references made to it during our discussion today.

8 All right. Thanks, Mr. Ellison.

9 Mr. Ogata.

10 MR. OGATA: Thank you, Mr. Fay. Staff  
11 has probably four proposed changes. I would like  
12 to take up the Air Quality change, because I  
13 understand Mr. Rubenstein has to leave and I'd  
14 like him to comment for us on the change in the  
15 verification that I believe he's aware of, that I  
16 am not. So I'll leave it to him to describe that.

17 But first of all, with respect to Air  
18 Quality Condition 54, again, Staff would like to  
19 reiterate that we respectfully disagree with the  
20 errata change to the condition. We believe that  
21 Staff's proposed condition reduces the  
22 construction equipment PM10 and reduces the  
23 exhaust emissions to mitigate the contribution of  
24 the construction equipment's PM10 impacts.

25 We believe that the Staff condition is

1       -- is in line with what the ARB is proposing to do  
2       at this point in time. But having said that, we  
3       will also propose some changes to the proposed  
4       errata condition because of the fact the  
5       description of the program is a little bit in  
6       error. So Staff's proposal is included in the  
7       comments that we've passed out this morning.  
8       Basically, just corrects that problem.

9               We have been in contract with the Air  
10       District. They are willing to accept these funds.  
11       They believe that there is an opportunity to use  
12       this money to do something in the harbor with  
13       respect to maybe powering some of the engines, or  
14       something to that effect, so that there will be a  
15       geographic nexus between the use of this money and  
16       the -- and the impacts.

17              However, they also didn't want to have  
18       that language put into the condition because they  
19       need some flexibility for that.

20              So that's the only change we want to  
21       make, and with that I'll ask Mr. Rubenstein to  
22       describe the change in the verification. I  
23       believe that needs to be done.

24              HEARING OFFICER FAY: Please.

25              MR. RUBENSTEIN: Thank you. Gary

1 Rubenstein, from Sierra Research, on behalf of the  
2 Applicant.

3 We have reviewed the revised language  
4 that the Staff has proposed for that condition,  
5 and we have no objections to it.

6 MR. OGATA: The verification?

7 MR. RUBENSTEIN: I don't know if the  
8 Staff is going to propose a change to the  
9 verification at this point.

10 MR. OGATA: Okay.

11 MR. RUBENSTEIN: If they haven't told  
12 you about it, then maybe there's no change, and  
13 we're comfortable with the verification as is.

14 MR. OGATA: Well, there seems to be some  
15 additional clarity that could be made to the  
16 verification, as I said, at this point. I hadn't  
17 heard from our Staff person about that change, so  
18 -- here he is right now, so maybe you can ask Mr.  
19 Layton to clarify that for us.

20 MR. LAYTON: Good morning. Matthew  
21 Layton, for Air Quality unit.

22 Gary and I had talked a little bit about  
23 the potential to require the money to be deposited  
24 within 30 days of certification. Obviously there  
25 are a couple of other permits outstanding, so the

1       Applicant has some concerns about the timing of  
2       that. But in trying to achieve some relationship  
3       between the construction impacts and the  
4       mitigation that is being proposed under this  
5       revised condition, which is the -- let's say the  
6       Carl Moyer program, the sooner the money gets into  
7       the Carl Moyer program, the sooner the money, or  
8       the mitigation measures will be out on the harbor,  
9       let's say. If we delay, then there will be no  
10      relationship, timing-wise, between the mitigation  
11      measures they are proposing and the construction  
12      impacts.

13                So we would prefer that the money get in  
14      there sooner. But obviously, the Applicant has  
15      expressed some concern. So I am proposing that we  
16      -- the language in the verification be changed to  
17      30 days of -- post certification. I think the  
18      Applicant has some concerns about that.

19                PRESIDING MEMBER KEESE: Mr. Ellison.

20                MR. ELLISON: I think we would prefer to  
21      see language that says within 30 days of receiving  
22      the final permit authorizing construction of the  
23      facility.

24                HEARING OFFICER FAY: All right. Is  
25      there anymore on that? I mean, I understand the

1 two parties' views. Anymore details regarding  
2 this condition?

3 MR. OGATA: Just for clarification, Mr.  
4 Fay. Mr. Ellison, when you talk about final  
5 permit, are you talking about the final decision  
6 in this matter, or some other final permit?

7 MR. ELLISON: I'm referring to not  
8 necessarily this permit, but, for example, if  
9 there are other federal permits that are required  
10 to authorize construction of the facility that are  
11 still outstanding, that we not have to deposit the  
12 money until we know we can build the plant, is the  
13 issue here.

14 And I think the concept, you know, tell  
15 me if I'm wrong, Mr. Layton, but I think that's  
16 the concept that Staff is looking for. And we  
17 don't have any concern with that concept. But  
18 there is the possibility that if the money were  
19 deposited after certification but prior to the  
20 final permit, a final federal permit that's  
21 required, that you could end up having spent money  
22 for a project that's not going forward. So we --  
23 we'd prefer not to see that outcome.

24 MR. LAYTON: I'm not sure the money will  
25 get spent that quickly in the Moyer program;

1           therefore --

2                       (Laughter.)

3                       MR. LAYTON: I guess the -- I understand  
4           the Applicant's concern, because once they put the  
5           money in I doubt they will be able to get the  
6           money back. So I do understand that concern.

7                       But in trying to time the construction  
8           impacts and the mitigation, the sooner the money  
9           gets into the Moyer program, the more likely  
10          there'll be an overlap in these two issues.

11                      HEARING OFFICER FAY: Okay. I think we  
12          understand the two parties' positions.

13                      MR. OGATA: Excuse me, Mr. Fay --

14                      MR. ELLISON: If I could offer one  
15          additional comment, which is that in terms of the  
16          timing of -- correlating the impacts with the  
17          money, obviously construction is not going to  
18          commence until the final federal permit  
19          authorizing construction occurs. And so if there  
20          were some delay in the federal permit that caused  
21          a delay in deposit of the money, it would also  
22          force a delay in construction. And so you  
23          wouldn't end up with a situation of the  
24          construction activity going forward absent the  
25          money being deposited.

1                   HEARING OFFICER FAY: And it occurs to  
2                   me that once the money is deposited with the  
3                   District, then it's up to the District to create  
4                   the nexus, you know, to choose a -- the use of  
5                   that money in such a way that it does match up in  
6                   time and location. And I suppose the District's  
7                   in the best position to determine that. So maybe  
8                   we can leave that up to them.

9                   MR. OGATA: Mr. Fay, I don't want to,  
10                  you know, get bogged down with minutiae, but I do  
11                  have a concern from the compliance perspective.  
12                  How do we know what the final federal permit is  
13                  going to be? Is there a different trigger that we  
14                  can use? Because, you know, our compliance unit  
15                  is going to be probably unable to determine when  
16                  that period of time is, so we won't know when that  
17                  time starts.

18                  MR. ELLISON: Well, I suppose you could  
19                  impost an obligation on the Applicant to inform  
20                  you of when the final permit had been received.  
21                  That information will probably -- would be  
22                  accompanied by a check in the real world, but --  
23                  and in terms of finding some other trigger, you  
24                  know, we can -- we can continue to talk about that  
25                  and perhaps inform the Committee on Wednesday, we

1 can come to a better solution. But off the top of  
2 my head, it's hard for me to construct one.

3 HEARING OFFICER FAY: All right. You  
4 know, I think this is a detail that'll fall within  
5 verification. If the Staff and Applicant want to  
6 caucus on this, that's fine, and you can submit  
7 something. Otherwise, the Committee has the gist  
8 of what you need, and I think we can require a  
9 report, and then within 30 days of the date  
10 contained in the report the check has to be there  
11 at the -- at the District. And then some evidence  
12 that that has been delivered.

13 Okay. Anything further, then?

14 MR. OGATA: Yes, Mr. Fay. We have two  
15 additional comments in writing that I won't go  
16 over, just changing something in BIO-7, which  
17 refers to an agency, spelling them out, and then,  
18 as Mr. Ellison pointed out, we have Soil and Water  
19 Condition 5 attached as the last page to our  
20 filing today.

21 And one thing I neglected to put on is  
22 we also are proposing the deletion of Condition  
23 TRANS-9, and the reason for that is we have  
24 determined recently that it probably is not going  
25 to -- that the Applicant is probably not going to

1       be able to comply with TRANS-9, because we  
2       discovered that the PUC doesn't do what we are  
3       asking them do to in this condition. So after  
4       having discussed it with -- with the PUC and some  
5       other agencies, we've decided that we can live  
6       with just the straight deletion of TRANS-9.

7               HEARING OFFICER FAY: Can you give us a  
8       reference in the PMPD where that is? That's all  
9       right, I've got it.

10              MR. OGATA: TRANS-9 is page 285 of the  
11       PMPD.

12              And that concludes our comments.

13              HEARING OFFICER FAY: And you're saying  
14       that the PUC is not the appropriate agency to  
15       coordinate this with?

16              MR. OGATA: That's correct. Apparently  
17       they conduct audits. They don't actually issue  
18       the letter, so they've informed us that they're  
19       not in a position to do this.

20              HEARING OFFICER FAY: If it was  
21       important at one point to require necessary  
22       arrangements as a condition, do you just want to  
23       substitute the appropriate agency that --

24              MR. OGATA: Well, it would -- it would  
25       be coordinated with Union Pacific, but we also

1 believe that in the timeframe that we're looking  
2 here, given that we believe the Applicant wants to  
3 start construction right away, we also have  
4 determined that it's likely, very likely that they  
5 would not be able to comply with this condition  
6 even if we made it Union Pacific.

7 So, as I said, Staff has just determined  
8 that there will probably be other ways to verify  
9 this, but at this point in time we are satisfied  
10 with just the deletion of this condition.

11 HEARING OFFICER FAY: All right. And  
12 there would not be any impacts to the  
13 transportation system, or anything else that --  
14 that Staff --

15 MR. OGATA: No.

16 HEARING OFFICER FAY: -- would be  
17 concerned about?

18 MR. OGATA: No.

19 HEARING OFFICER FAY: Applicant, any --  
20 I assume you go along with that?

21 MR. ELLISON: We have -- that's fine.  
22 We have no objection to that.

23 HEARING OFFICER FAY: All right. Thank  
24 you.

25 Anything further?

1 MR. OGATA: Nothing further.

2 HEARING OFFICER FAY: Is any other  
3 agency here to comment on the errata?

4 MS. JOHNSON: Mr. Fay, Chair Keese, my  
5 name is Deborah Johnston, representing the  
6 Department of Fish and Game.

7 And we appreciate the changes that you  
8 made in -- according to our letter, but we were  
9 concerned that on the few occasions where changes  
10 were made on one page in the errata, they were not  
11 made on other pages where they were very similar.

12 An example is the changes made on page  
13 164, but not made on page 176, 184. Another  
14 example is changes were made on page 149, but not  
15 on page 182.

16 So if we could ask Staff to go through  
17 our letter and make the changes throughout the  
18 entire document where we referenced, we would  
19 appreciate that.

20 And what I'd like to do now is go  
21 through the errata and provide some comments.

22 PRESIDING MEMBER KEESE: Excuse me.  
23 You're suggesting that the -- the proper cites  
24 were in your letter?

25 MS. JOHNSON: Yes.

1                   PRESIDING MEMBER KEESE: And they were  
2                   made at one point, but not at others.

3                   MS. JOHNSTON: Right. Just when I  
4                   reviewed the errata, I just saw the changes were  
5                   made, like on the -- usually it was the first page  
6                   that was referenced in our comments, and not on  
7                   subsequent. And so for clarity and continuity  
8                   through the document, it should be made in the  
9                   other pages.

10                  On page 150, the document states that  
11                  eight species made up 95 percent of the total  
12                  number of species entrained. This is an extremely  
13                  misleading statement, and we have recommended  
14                  continuously that it be changed. What that  
15                  reference is is to the eight species of fish  
16                  larvae represent 95 percent of those fish larvae  
17                  entrained. There were crab species that were  
18                  identified and entrained. There were many more  
19                  species that were entrained that were not  
20                  identified.

21                  The technical working group specifically  
22                  asked the consultant to only identify and  
23                  enumerate fish larvae and crab juvenile. And so  
24                  this statement, I believe, is making a lot of  
25                  confusion to the public, and also it's not

1 completely accurate. And we recommend that it be  
2 changed to the eight species of fish larvae made  
3 up 95 percent of those species entrained. And  
4 that would be a more accurate representation.  
5 This is also referenced on page 181.

6 On page 157, you are discussing the  
7 alternative cooling towers, and the expenses for  
8 that. And your last statement says, since the  
9 evidence established that significant impacts from  
10 entrainment can be mitigated, the cooling tower  
11 alternative is not preferred.

12 The cooling tower alternative is for  
13 thermal effects; it is not for entrainment. And  
14 we stated at the Regional Water Quality Control  
15 Board that an alternative that has not been  
16 considered is the retrofit of the existing eight  
17 towers for cooling. And so those costs would be  
18 significantly less than this, because it would be  
19 a retrofit, and not a new construction, but also  
20 to say that the cooling tower is fixing  
21 entrainment impacts is not accurate. It's for  
22 thermal impacts.

23 Then we go through the heated water is  
24 deleterious to larval organisms. You've added it  
25 as a footnote. We would also appreciate that it

1 be added in the document, instead of just as a  
2 footnote. We feel it's important to bring out  
3 that elevated temperatures are deleterious to  
4 larval organisms.

5 On page 180, you are discussing the  
6 increase in productivity. And at our technical  
7 work meeting on Thursday, Dr. Gray Caillett stated  
8 that, in fact, you can monitor larval increases  
9 from mitigation from wetland enhancement and  
10 increase. And so we feel that it's important to  
11 bring in monitoring to see what these wetlands are  
12 going to be doing.

13 The Department consistently --

14 HEARING OFFICER FAY: Excuse me.

15 MS. JOHNSTON: Yes.

16 HEARING OFFICER FAY: The meeting you're  
17 referring to that was --

18 MS. JOHNSTON: The technical working  
19 group meeting on Thursday.

20 HEARING OFFICER FAY: This last  
21 Thursday?

22 MS. JOHNSTON: Yes.

23 HEARING OFFICER FAY: Okay. That --  
24 that's not part of our record.

25 MS. JOHNSTON: It's in addition to what

1 the record. And Dr. Caillett stated also in the  
2 regional board, which is part of your record, that  
3 you can mitigate and monitor that mitigation to  
4 determine if larval production does increase, in  
5 fact.

6 Okay. Then 181, it goes on.

7 On BIO-7, you've used the title the  
8 Elkhorn Slough Enhancement Project. And I think  
9 it would be more appropriate to title it the  
10 Elkhorn Slough Mitigation Project, because this is  
11 a mitigation. It's not strictly an enhancement.  
12 And where the Department feels it's important is  
13 that the mitigation be for the lost productivity  
14 of larvae. You go in through on the priority for  
15 the transactions, and the second is to purchase  
16 fee or interests on wetland areas that are in need  
17 of restoration enhancement. But then as you  
18 follow down into the second bullet, it states  
19 where appropriate and feasible, which seems  
20 counterproductive to the statement that your  
21 second bullet is to purchase fee.

22 You may want to reword it as -- and  
23 delete where appropriate and feasible, to as  
24 previously described, restore wetlands and the  
25 slough.

1                   And as I stated, the Department requires  
2                   monitoring for mitigation. Otherwise, you don't  
3                   have any way of knowing whether your mitigation is  
4                   actually effective. And throughout here, your  
5                   bullet talking about the portion of the seven  
6                   million is for long term stewardship. You've put  
7                   in parentheses, management and maintenance. You  
8                   may also want to include monitoring in that  
9                   parentheses, because that is the only way you're  
10                  going to know, through monitoring, is whether all  
11                  these projects are effective for reversing.

12                  If you're saying we're going to decrease  
13                  sediment input, we're going to decrease chemical  
14                  input to the slough, without monitoring you have  
15                  no way of document how much good you're actually  
16                  doing. So the word "monitoring" needs to be in  
17                  some of these areas more prominent.

18                  And I was confused on the last bullet,  
19                  where you've got the location of the Elkhorn  
20                  Slough Enhancement Project will be in the  
21                  immediate Elkhorn Slough watershed area. And I'm  
22                  hoping that doesn't mean you're limiting to just  
23                  Elkhorn Slough proper, but are including the  
24                  entire watershed. The watershed includes Bennett  
25                  Slough, Morro Cojo Slough, Old Salinas River,

1       Tembladero Slough. And the word immediate causes  
2       confusion, and I'd recommend deleting it and just  
3       say the project will be in the Elkhorn Slough  
4       watershed, because the watershed is a physically  
5       delineated boundary through there.

6               HEARING OFFICER FAY: Well, if it's a  
7       physically delineated boundary --

8               MS. JOHNSTON: Yes, watersheds are  
9       physically delineated by ridge -- ridge tops. And  
10      so that --

11              HEARING OFFICER FAY: Okay.

12              MS. JOHNSTON: -- so --

13              HEARING OFFICER FAY: So if it is within  
14      the immediate Elkhorn Slough, as opposed to the  
15      periphery watershed area, it seems that the  
16      identification is identical.

17              MS. JOHNSTON: Well, I've heard some  
18      discussion at the public hearing on September 21st  
19      that it was going to be limited to projects at  
20      Elkhorn Slough, and it implied that it would be to  
21      the exclusion of these other sloughs that are  
22      within Elkhorn Slough watershed. And that's where  
23      my confusion as to the word immediate is. Because  
24      --

25              HEARING OFFICER FAY: Okay.

1 MS. JOHNSTON: -- the Morro Cojo,  
2 Bennett Slough, Old Salinas, they are all within  
3 the Elkhorn Slough watershed. But whether they  
4 would be considered immediate, because they don't  
5 attach directly to the Elkhorn Slough water body,  
6 that may, at least for myself, it does cause some  
7 confusion through there.

8 On page 13, the first full bullet,  
9 states the project owner, after consultation with  
10 the Elkhorn Slough Foundation, will provide an  
11 annual report. It doesn't describe to who. I  
12 would recommend adding some wording as to who the  
13 annual report is going to.

14 The last bullet, over the course of  
15 three to five years the project funded by the  
16 mitigation moneys should be complete, except for  
17 any necessary stewardship activities. Based on  
18 the Department's mitigation and monitoring, you  
19 may want to expand that to five to ten years.  
20 Some projects cannot be completed in three to five  
21 years, because if there's remediation of soil,  
22 there may be contamination, they may take longer  
23 than one or two years to remediate that. And so  
24 giving them the flexibility up to ten years to  
25 complete a project, but you still have the dollar

1 amount that's set. So that doesn't increase, but  
2 it gives them flexibility on the ground there,  
3 through there.

4 You -- on the guidance, the first  
5 bullet, performance standards. We'd recommend  
6 adding an item F, production of larvae. This  
7 whole mitigation is for production lost larvae.  
8 There should be some mechanism to try to document  
9 how the production of larvae is increased,  
10 decreased, neutral.

11 And that's the comments I have for you  
12 today. Thank you.

13 HEARING OFFICER FAY: All right. Do you  
14 have those in writing that you can submit?

15 MS. JOHNSTON: No, I don't. I just got  
16 back from a two week vacation overseas, and so  
17 I've been away.

18 HEARING OFFICER FAY: Okay.

19 MS. JOHNSTON: I can write them up and  
20 --

21 HEARING OFFICER FAY: We won't have the  
22 transcript in time for the final decision.

23 MS. JOHNSTON: Okay.

24 HEARING OFFICER FAY: So if we don't  
25 have it from you in writing, I'm afraid I -- I

1       haven't been able to follow your detailed comments  
2       in all my notes.

3               MS. JOHNSTON:  If I brought them with me  
4       Wednesday would that be soon enough for you?

5               HEARING OFFICER FAY:  No.  I -- I'd need  
6       them today.  If you can, like write them in a --  
7       in a form that we could have them, you know, make  
8       use of them, even if it's handwritten.

9               MS. JOHNSTON:  I -- I can write them on  
10       a piece of paper, but I'm four hours from my  
11       office.

12              HEARING OFFICER FAY:  Yeah.  I mean,  
13       anything would help.

14              MS. JOHNSTON:  Okay.

15              HEARING OFFICER FAY:  It's just we have  
16       a disconnect between what you're saying here and  
17       when we'll be able to get the record.

18              MS. JOHNSTON:  Okay.  Well, I'll start  
19       writing them up on a piece of paper for you.

20              HEARING OFFICER FAY:  Okay.  Thank you.

21              MS. ROSS:  Mr. Fay, she's welcome to use  
22       the Public Adviser's office.

23              HEARING OFFICER FAY:  Good.  Great.

24              Any other agencies represented here  
25       today?

1                   Mr. Ellison.

2                   MR. ELLISON: We would like the  
3                   opportunity to comment on Fish and Game's comments  
4                   here.

5                   HEARING OFFICER FAY: Sure.

6                   MR. ELLISON: Do you want us to do that  
7                   now, or --

8                   HEARING OFFICER FAY: Yeah, why don't  
9                   you do that now. And will Staff be commenting, as  
10                  well?

11                  MR. OGATA: Yes, we'll have a couple of  
12                  comments, I believe. Yes, we will.

13                  MR. ELLISON: The Fish and Game comments  
14                  are -- are extensive, and quite -- we haven't had  
15                  the opportunity to obviously review anything in  
16                  writing, or any specific language in writing, so I  
17                  want to reserve most of our comments until we have  
18                  a change to do that. And given the timing of --  
19                  of the comments, that puts both the Commission and  
20                  the Applicant in a difficult position, to be  
21                  receiving significant comments at this late time.  
22                  But let me do the best that I can, based upon what  
23                  we've heard this morning.

24                  With respect to the change on page 150,  
25                  regarding specifying that the species are fish

1        larvae. I -- I think we're fine with that. We  
2        don't have any concern about that proposed change,  
3        subject to reviewing it in writing.

4                We do have concerns with Fish and Game's  
5        comments with respect to the alternative of  
6        cooling towers. And let me begin by saying I  
7        believe that I heard a comment that the retrofit  
8        of existing towers on the site has not been  
9        considered as an alternative. And I do  
10       specifically want to correct that.

11               There are no existing cooling towers on  
12       the site. The retrofit of any existing cooling  
13       towers therefore would not be an appropriate thing  
14       to consider, because they do not exist.

15               There are existing exhaust stacks on the  
16       site, used for the dispersion of exhaust gases  
17       from the facility, and if Fish and Game is  
18       referring to the retrofit of those stacks for use  
19       as cooling towers, I don't know of any situation  
20       in which that has been shown to be feasible, or  
21       which it has even been considered. That would  
22       essentially be the construction of new cooling  
23       towers, because the applications are so entirely  
24       different. And a air exhaust stack and a cooling  
25       tower are such fundamentally different

1 technologies that it's not a retrofit application  
2 to -- to discuss that.

3 So I think the discussion that has  
4 occurred regarding new cooling towers would be the  
5 -- would reach the same conclusion with respect to  
6 tearing down the exhaust stacks and replacing them  
7 with cooling towers. That would not be a retrofit  
8 application. And I want to make sure the  
9 Committee understands that.

10 A number of the other changes that were  
11 proposed, frankly, I was having a hard time  
12 keeping up with them, and several of them were not  
13 specific word changes, so I'm going to have to  
14 reserve judgment until we see the specific changes  
15 as to whether we have concerns about that or not.

16 With respect to -- and I'm sure, by the  
17 way, that I am missing some comments here because  
18 of that, but I do want to comment on the ones that  
19 I caught, and that we are prepared to comment on.

20 With respect to deletion of the word  
21 immediate in the final bullet, under, I believe,  
22 objectives under BIO-7, we do not object to that.  
23 I think that's -- that's fine.

24 And then my final comment, again  
25 reserving the right to review what comes out in

1 writing, I believe I heard a proposal that under  
2 the first bullet, under guidance, that a new  
3 performance standard F, production of larvae, be  
4 added. We would -- we do have concerns with that,  
5 regarding the feasibility of doing that. There's  
6 quite a bit of evidence in the record about --  
7 about that issue, and I do want to register our  
8 concern on that issue.

9 Be happy to -- to try and sit down with  
10 Fish and Game immediately following this meeting  
11 to see what -- what we can work out on -- on these  
12 various comments.

13 Thank you.

14 HEARING OFFICER FAY: And your concern  
15 is -- is not regarding a goal of trying to achieve  
16 more production of larvae, but rather that -- that  
17 that be included in performance standards, and so  
18 it's a -- it's a measurement concern, or a  
19 monitoring concern. Is that correct?

20 MR. ELLISON: My understanding is that  
21 there are very significant issues regarding the  
22 feasibility of a performance standard measuring  
23 the production of larvae, the problem being that  
24 you -- that you cannot isolate the effect of  
25 either the power plant or mitigation measures

1 funded by the power plant on larvae from all of  
2 the other influences that affect production of  
3 larvae in the slough.

4 And therefore, while the goal of all of  
5 this is to, based upon technical expert testimony,  
6 do things which the technical experts and -- and  
7 the various advisory groups agree will likely have  
8 the most positive impact on larvae. And I want to  
9 emphasize we have no objection to that.

10 The feasibility of adopting a  
11 performance standard which can isolate the impact  
12 of mitigation measures on larvae and separate  
13 that impact from all of the other influences on  
14 larvae, my understanding is that the technical  
15 experts have agreed that that is an extremely  
16 difficult, if not impossible, task.

17 So, subject to further discussions with  
18 Staff and with Fish and Game about how you would  
19 do this, we have to express some concerns about  
20 it.

21 HEARING OFFICER FAY: I think the PMPD  
22 found that the number of larvae was an example of  
23 the kind of detail that -- that the Commission was  
24 not seeking in monitoring. But let's hear from  
25 Staff.

1                   MR. OGATA: Thank you, Mr. Fay. Dick  
2                   Anderson, a Staff Biologist, would like to address  
3                   that issue, as well.

4                   MR. ANDERSON: This issue of monitoring  
5                   for fish larval productivity has been one that has  
6                   been discussed for months. And the feeling is  
7                   that you can monitor for fish larval -- you can  
8                   understand how many fish larvae are in the water  
9                   by doing source water sampling. The concern is  
10                  that if that becomes a performance standard,  
11                  that's a different type of -- of -- you're  
12                  monitoring for a different reason. And trying to  
13                  determine exactly what is causing the productivity  
14                  to increase or decrease is a very difficult  
15                  experiment. It can't be done when you have as  
16                  many confounding situations and things going on as  
17                  you do at Elkhorn Slough.

18                  You can monitor it, but if it goes up  
19                  you can't definitely say for what reasons it went  
20                  up. And if it goes down, you could still be doing  
21                  enhancements to the slough that result in -- in  
22                  productivity not dropping as much as it would've  
23                  because of the enhancements, because of other  
24                  influences into the slough.

25                  We have chosen to put in performance

1 standards that we think are reasonable and  
2 attainable. So if the term productivity of larvae  
3 is put in under performance standards, then we  
4 immediately move into a situation where we have to  
5 define how we're going to determine what's  
6 producing that productivity, or if that  
7 productivity is a result of -- of enhancements  
8 done for the slough. It's going to be very  
9 expensive and very difficult.

10 Simply monitoring the status of larval  
11 in the water column at different sampling  
12 stations, that's possible. You just can't say  
13 what's causing an increase or a decrease or a  
14 steady state. That type of monitoring could be  
15 done for not much expense, but I'm not sure, other  
16 than just keeping track of that, what good it  
17 would do.

18 The mitigation package as it stands has  
19 approximately \$2 million would be designated for  
20 an endowment, which would provide about a minimum  
21 of \$100,000 a year for maintenance, remediation,  
22 and monitoring. We do use the term monitoring in  
23 here quite a bit.

24 So Staff is -- is against adding  
25 productivity or production of larvae, if the

1       intent is to determine whether or not the  
2       enhancement package is working, because we feel  
3       that the effects are on the system, and if we  
4       enhance the system we have to be doing something  
5       well. Measuring and quantifying that is very  
6       difficult, and that's -- that's something we would  
7       like to avoid.

8                   HEARING OFFICER FAY: Any -- did you  
9       want to comment on any other comments of Fish and  
10      Game?

11                   MR. ANDERSON: I didn't -- other than I  
12      think there was some confusion with the cooling  
13      tower issue, and I think Mr. Ellison straightened  
14      out. I didn't -- it was hard for me keep track of  
15      the changes. I'd like to see them in writing to  
16      comment on them completely. But I didn't hear --  
17      hear anything that -- that I really disagreed  
18      with, other than the larval production.

19                   HEARING OFFICER FAY: And what about the  
20      first one, regarding the eight species of fish  
21      larvae, to specify that it's fish larvae?

22                   MR. ANDERSON: That would be fine.  
23      That's what was -- that was what -- what was  
24      monitored, was fish larvae.

25                   HEARING OFFICER FAY: Okay. And in

1 terms of the -- oh, the geographic definition.

2 Yes.

3 MR. ANDERSON: Well, I think we've gone  
4 from calling this a number of different things.  
5 And immediate, I've always been in favor of  
6 looking at the watershed as a whole, and there may  
7 be enough latitude even with the word immediate in  
8 there to look at -- at the whole watershed.  
9 Anything that contributes to the watershed. And I  
10 think Morro Cojo is -- is also a valuable area.  
11 And I don't disagree with what Fish and Game said.

12 I think that over -- over the last month  
13 or two the title has changed, possibly due to  
14 comments from somebody else. I don't think that  
15 was our original -- I think I called it just the  
16 watershed.

17 (Inaudible asides.)

18 PRESIDING MEMBER KEESE: There was  
19 testimony going both ways over the -- there was  
20 testimony suggesting it should be the whole coast.  
21 There was testimony saying it should be right in  
22 the neighborhood.

23 HEARING OFFICER FAY: Okay. Yeah, and  
24 we're not anxious to have -- I mean, this is not  
25 -- was not noticed as an evidentiary hearing. We

1 don't want to take more evidence.

2 But, as the Chairman indicated, and I  
3 think some of the detail got down to disagreement  
4 about whether any enhancement should occur to  
5 freshwater sources, since the impact was occurring  
6 from the salt water environment. But I think the  
7 Committee's probably going to want to lean towards  
8 allowing the two permitting agencies, with advice  
9 from the advisory team, sort this out, and craft  
10 it as -- as best they can, since they're going to  
11 be closer to the -- the slough environment at the  
12 time the money's available.

13 MR. ANDERSON: Sure.

14 HEARING OFFICER FAY: All right.  
15 Anything further, then? Any -- any non-agency  
16 groups or individuals that would like to address  
17 the Committee?

18 Ms. Ross.

19 MS. ROSS: My name is Priscilla Ross,  
20 and I'm from the Public Adviser's Office.

21 I just want to acknowledge that two  
22 pieces of correspondence were received by our  
23 office. One, addressed to Mr. Keese, from the  
24 Center of Marine Conservation, and from Steve  
25 Shimek, the Executive Director for The Otter

1 organization.

2 Just they're in the record, docketed,  
3 and part of this hearing.

4 HEARING OFFICER FAY: Okay. And we have  
5 those in writing, and so we can assess --

6 MS. ROSS: There are extra copies  
7 available on the table outside.

8 HEARING OFFICER FAY: Thank you. And  
9 those will be docketed?

10 MS. ROSS: Yes.

11 HEARING OFFICER FAY: Good.

12 All right. Anything further, then?

13 The Committee will consider the comments  
14 made, and if it agrees to adopt any of them  
15 there'll be a short amendment to the errata that  
16 would be presented to the Commission on Wednesday,  
17 along with the PMPD and the errata.

18 And so that was the purpose today, and  
19 also to sort of see if there were any other late  
20 breaking issues that somebody was planning on  
21 bringing up in front of the Commission, we'd just  
22 like to know about it ahead of time.

23 So now is the time to let us know if you  
24 have anything like that.

25 Mr. Ogata.

1                   MR. OGATA: Could we have just a minute,  
2                   please.

3                   HEARING OFFICER FAY: All right.

4                   (Pause.)

5                   MR. OGATA: Mr. Fay, there is one issue  
6                   that's not directly related to the matters before  
7                   us, but we do want to bring it to your -- to the  
8                   Committee's attention.

9                   We understand that there are going to be  
10                  two minor changes to the project description with  
11                  respect to an additional laydown area, and with  
12                  respect to the route of the -- the outfall, I  
13                  believe. And I'd ask to -- to just briefly  
14                  comment on -- on that, and then I'd be happy to  
15                  describe the process by which Staff's proposing to  
16                  handle those changes to the project description.

17                  HEARING OFFICER FAY: Okay, please.

18                  MR. ELLISON: Let me emphasize in  
19                  discussions with Staff, it's Duke's belief, and  
20                  Staff agrees, that these are appropriate for post-  
21                  certification amendments, as opposed to anything  
22                  that would affect the Commission's decision on  
23                  Wednesday. But we did want to make you aware that  
24                  we've had these discussions, anyway.

25                  The first concerns, it appears as though

1       some of the equipment is going to be delivered  
2       earlier than Duke expected, and there is also a  
3       selected catalytic reduction retrofit project  
4       going on onsite, and as a result of that there are  
5       some minor changes to the laydown area for -- for  
6       equipment in the project description.

7               And we've discussed that with Staff, and  
8       propose to submit a post-certification amendment  
9       to just amend the description of the laydown area.

10              Similarly, as often happens in -- in a  
11       project that's proceeding towards final  
12       engineering design, there are some design changes  
13       to the cooling system, cooling piping, that we've  
14       discussed with -- with Staff, and we think are  
15       also going to probably necessitate a post-  
16       certification amendment.

17              In both of these cases we think the  
18       amendments are minor, that there are not any  
19       significant environmental impacts or compliance  
20       with LORS implicated by either amendment. Of  
21       course, the Staff will be the judge of that, and  
22       Mr. Ogata will describe that process.

23              But in the interest of -- of keeping the  
24       Committee fully abreast of everything that's going  
25       on with the project, we wanted to inform the

1 Committee that we have had those discussions with  
2 the Staff. But again, I want to emphasize that in  
3 Staff's view, and in our view, these are not  
4 issues which should affect the decision, but  
5 rather are post-certification amendments which are  
6 typical of these sorts of projects.

7 HEARING OFFICER FAY: Okay. Thank you.

8 We are advised -- Mr. Ogata, anything  
9 further?

10 MR. OGATA: Thank you, Mr. Fay,  
11 Commissioner Keese.

12 Again, I just wanted to briefly describe  
13 the process by which we intend to handle this,  
14 because we understand this is kind of -- it could  
15 be a delicate matter. We did want to inform the  
16 Committee and the Commission about this issue.

17 In Staff's view, these changes are not  
18 significant. The laydown area is an area that has  
19 been previously disturbed. We believe that it's  
20 already been analyzed by the county in the tank  
21 farm demolition project negative dec that they  
22 issued. However, we're going to go ahead and look  
23 at that.

24 Also, the -- on the other changes being  
25 done on the property site, and our cultural and

1       our biology staff have -- have looked at it to the  
2       extent -- the information that we have available,  
3       and we don't believe that there are any  
4       significant issues with that, as well.

5               So, as you're probably aware, one of the  
6       provisions in our compliance regulations allows  
7       for what's called an insignificant change, and  
8       that is if there are no conditions being changed,  
9       and there are no LORS that need to be addressed,  
10      then Staff will issue an opinion that this is an  
11      insignificant change. The public has 14 days to  
12      comment on that, and to ask that it be handled in  
13      the regular amendment process. But it will have  
14      to meet several criteria, which is in our  
15      regulations, in order for Staff to change its  
16      opinion.

17             And, again, we have had a preliminary  
18      look at this. We are expecting the actual  
19      petition to come in very soon. At that time,  
20      Staff will be in a position to issue its -- its  
21      determination about the significance of this. But  
22      our preliminary view is that these changes are  
23      insignificant. They are changes to the project  
24      description. There will not be any conditions  
25      that need to be changed. So we are comfortable

1 with handling it in this manner.

2 HEARING OFFICER FAY: As I recall, some  
3 of the conditions, such as in cultural, require  
4 monitoring of earth disturbance. So regardless of  
5 where that occurred, there would be monitoring for  
6 cultural resources. Is that correct?

7 MR. OGATA: Yes, that's correct. To the  
8 extent that we have conditions that already handle  
9 those kinds of things. For example, in biology I  
10 understand there's a requirement for fencing  
11 around the site to -- to keep out the salamander.  
12 That may be something that Duke is going to have  
13 to do. But certainly, again, that's not a change  
14 in any condition, that's not a problem. They  
15 would just comply with it, because it would become  
16 part of the project description.

17 So those things like that will carry  
18 over, so there isn't any extensive need to do any  
19 significant analysis.

20 HEARING OFFICER FAY: Okay.

21 All right. Are there any other comments  
22 people would like to make?

23 I'd like to ask if there's any members  
24 of the public here who would like to make a  
25 comment at this time.

1 I see no indication. All right.

2 Well, we thank you all, and we are  
3 adjourned. We'll see you on Wednesday.

4 (Thereupon the Committee Conference  
5 was concluded at 11:00 a.m.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## CERTIFICATE OF REPORTER

I, DEBI BAKER, an Electronic Reporter,  
do hereby certify that I am a disinterested person  
herein; that I recorded the foregoing California  
Energy Commission Committee Conference; that it  
was thereafter transcribed into typewriting.

I further certify that I am not of  
counsel or attorney for any of the parties to said  
Conference, nor in any way interested in the  
outcome of said Conference.

IN WITNESS WHEREOF, I have hereunto set  
my hand this 31st day of October, 2000.

DEBI BAKER

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345